Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WHITEHEAD ASSOCIATES, INCORPORATED; CHESAPEAKE OUTDOOR ENTERPRISES, INCORPORATED; PNE MEDIA, INCORPORATED,

Petitioners,

v.

MONTGOMERY COUNTY COUNCIL; MONTGOMERY COUNTY, MARYLAND; MONTGOMERY COUNTY EXECUTIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FOURTH CIRCUIT BREACHED ITS JUDICIAL RESPONSIBILITY AND ERRED IN DETERMINING THAT THE STATUTE OF LIMITATIONS CAN OPERATE TO PRECLUDE A CHALLENGE OF A LEGISLATIVE BODY'S AUTHORITY TO ADOPT AND ENFORCE AN ORDINANCE

II. WHETHER THE FOURTH CIRCUIT ERRED IN DETERMINING THAT THE STATUTE OF LIMITATIONS CAN OPERATE TO PRECLUDE PETITIONERS' DEMAND THAT IT BE PAID FAIR MARKET VALUE BY RESPONDENT PURSUANT TO ARTICLE 25, SECTION 122E, ANNOTATED CODE OF MARYLAND, IF FORCED TO REMOVE THEIR BILLBOARDS.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners:
Whitehead Associates, Inc.
Chesapeake Outdoor Enterprises, Inc.
PNE Media, LLC

Respondents:
Montgomery County, Maryland
Montgomery County Council
Montgomery County Executive

CORPORATE DISCLOSURE

1. The Petitioners are not publicly held corporations or other publicly held entities.

2. The Petitioners are not a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity.

3. There is no other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set out in the Appendix at page 1. (App. 1). The opinions of the United States District Court for the District of Maryland are set out in the Appendix at page 6 (App 6) and page 18 (App. 18). All Opinions are unpublished.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Fourth Circuit issued its decision in this case on January 13, 2000. A Petition for Rehearing En Banc was denied on February 8, 2000. This Petition is filed within 90 days from the date of the panel rehearing denial and is thus timely.

STATUTORY PROVISIONS INVOLVED

§59-F-1.65 of the Montgomery County Zoning Ordinance states as follows:

> "Commercial signs or structures that advertise products or businesses not connected with the site or building on which they are located are prohibited. The only exception to this prohibition are:
>
> a. Temporary farm produce signs as specified in §59-F-1.24(c);

> b. Commercial signs or structures that are prohibited by this section and that were lawful on July 28, 1986 or were lawfully constructed, structurally altered or relocated after July 28, 1986. These signs or structures may be continued for a period of five (5) years from July 13, 1992. At the end of this 5-year amortization period, the signs or structures must be removed within ninety (90) days at the owner's expense."

Petitioners have argued below that §59-F-1.65 is unenforceable and invalid as being in conflict with State law as well as being in derogation of the zoning power bestowed upon the County Council by the General Assembly.

The County Council of Montgomery County, Maryland is given its zoning powers by the General Assembly of the State of Maryland, and these powers are found in Title VIII, Article 28, Annotated Code of Maryland, commonly known as the Regional District Act.

In §8-101(b)(2) of The Regional District Act, the General Assembly states as follows:

> "Except as otherwise provided in §§8-126 and 8-127 of this Subtitle, each district council, respectively, and in accordance with the conditions and procedures specified in this Article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district line within its county, (i) the

location, height, bulk, and size of buildings, other structures and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities and other purposes; and (vi) the uses of land, including surface, subsurface and air rights area for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes."

[Emphasis added].

In §8-109(b) of the Regional District Act, the General Assembly has mandated that "... [i]n the case of a lawful non-conforming use existing at the time of the enactment of the respective zoning ordinances within that portion of the regional district in Montgomery and Prince George's Counties comprising the Maryland-Washington Metropolitan District, created by Chapter 448 of the Acts of the General Assembly of Maryland of 1927, as amended, the particular use may be continued, and appropriate licenses may be issued, limited, however, to the particular use already existing in each case." [Emphasis added].

Accordingly, the General Assembly has mandated that uses of property which become non-conforming uses as a result of the implementation or amendment of a zoning ordinance are to be given protection from the newly implemented ordinance which makes the use non-conforming, and allows the non-conforming use to continue in existence.

§59-G-4.1 of the Montgomery County Zoning Ordinance, which was presumably enacted in acknowledgment of the General Assembly's mandate with respect to the continued use of non-conforming uses, allows all non-conforming uses to continue until such time as the use has changed or is abandoned. §59-G-4 et. seq. makes certain exceptions to the general rule, none of which apply to outdoor advertising signs.

Section 122E(b), Article 25, Annotated Code of Maryland, states as follows:

> "A county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality, that was lawfully erected and maintained under any State, county, or municipal law or ordinance." (Emphasis added).

Petitioners have argued below that, if they are required to remove their billboards, Respondents are required to pay Petitioners the fair market value of their signs pursuant to Section 122E(b).

When the General Assembly of Maryland enacted Article 25, §122E(b) in 1983, it eliminated the amortization approach and mandated payment by a municipality of fair market value for the required removal of billboards. Section 122E(b), in and of itself, prohibits amortization. In 1982, Senate Bill 702 was introduced to the General Assembly of Maryland, and was ultimately vetoed by Governor Hughes. (App. 30). In 1983,Senate Bill 712 was introduced and enacted as Article 25, §122E. Senate Bills 702 and 712 are substantially similar. Senate Bill 702 was vetoed in 1982 because it was deemed to eliminate amortization. (App. 30). This concern was raised again by opponents when Senate Bill 712 was introduced, and an opinion from the Attorney

General's office concluded that Bill 712 would eliminate amortization. (Add. 31).

Notwithstanding the Legislative history accompanying the enactment of Article 25, §122E which makes clear the Legislative intent to eliminate the amortization approach, in 1992 and again in 1997, Respondents enacted amortization ordinances, which constitute ultra vires acts in derogation of State law.

The Fourth Circuit opted not to rule on the issues raised on appeal; instead, it held that Petitioners' claims were time barred by the applicable statute of limitations, which is codified in Section 5-101, Courts and Judicial Proceedings Article, Annotated Code of Maryland, and states as follows:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

STATEMENT OF THE CASE

This suit involved a Complaint for Declaratory Judgment filed by Appellants seeking to enjoin the Appellees from removing the Appellants' billboards pursuant to an amortization statute embodied in the Montgomery County Zoning Ordinance (Section 59-F-1.65.). Appellants argued, *inter alia*, that the Montgomery County Council lacked the enabling authority to pass an amortization statute requiring the removal of a legal nonconforming use. During the pendency of the case, Appellees repealed and replaced the sign ordinance with a new ordinance having a negative amortization period. The District Court granted summary judgment in favor of Appellees, holding that the Montgomery County Council has the enabling power to enact an amortization statute requiring removal of nonconforming uses, that the amortization statute

is not unconstitutional and that Appellees are not required to pay just compensation to Appellants for removal of their billboards.

On appeal to the Fourth Circuit, Petitioners challenged the decision of the District Court on the following grounds:

> 1. Whether the District Court erred in holding that the Montgomery County Council possessed the enabling authority to enact an amortization statute that requires the removal of legal nonconforming uses.
> 2. Whether the District Court erred in holding that the Respondents are not required to pay Petitioners the fair market value of the signs.

On January 13, 2000, the Fourth Circuit did not address the issues raised on appeal; instead, the Fourth Circuit held that Petitioners' challenges are barred by the statute of limitations.

Petitioners' chief argument raised in this Petition is that the mere passage of time cannot erase the taint of an intrinsically void law, nor can it be used to retroactively bestow powers upon a legislative body that did not possess those powers on the date of enactment of the challenged law.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH ITS OWN PRIOR DECISIONS, DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL AND STATE APPELLATE COURTS, AND DECISIONS OF THE UNITED STATES SUPREME COURT; PETITIONERS' CHALLENGE OF THE VALIDITY OF THE AMORTIZATION ORDINANCE ADOPTED BY THE MONTGOMERY COUNTY COUNCIL ON THE GROUNDS THAT THE COUNCIL LACKS THE ENABLING AUTHORITY TO IMPLEMENT SUCH AN ORDINANCE IS A JURISDICTIONAL CHALLENGE WHICH CAN BE RAISED AT ANY TIME.

The Fourth Circuit held below that Petitioners' challenges are barred by the statute of limitations. In so holding, the Fourth Circuit relied exclusively on the holding in the case of National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991). In City of Raleigh, the Fourth Circuit was called upon to determine whether a claim asserting that an amortization statute resulted in a taking without just compensation was barred by the statute of limitations. In holding that it was so barred, the Fourth Circuit stated:

> "We hold only that the injury suffered by National, an injury that might or might not rise to the level of a taking, occurred upon enactment of the ordinance at issue." Id., at 1164.

In City of Raleigh, the Fourth Circuit concluded that the billboard owner's takings claim was not a continuing wrong:

> "In reaching this conclusion, we applied the two-part analysis outlined in Cooper v. United States, 442 F.2d 908 (7th Cir. 1971) for determining whether a continuing wrong exists: 'The particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged, must all be considered.'" Id., at 1167.

Whether or not the challenged ordinance in the instant case constitutes a taking is not at issue in this appeal. The present case challenges, *inter alia*, the very authority, and thus jurisdiction, of the County Council to enact an amortization ordinance. Thus, the threshold issue is not whether the owners' suffered the "regulatory interference with the primary uses of its property," as was the issue in City of Raleigh, but whether the Council possessed the enabling authority ab initio. The issue of damages, while raised in the context of the County's failure to pay fair market value as statutorily required pursuant Article 25, Section 122E, Annotated Code of Maryland, is not an issue that springs directly from the attack against the authority of the Council to enact the amortization statute in the first instance.

With respect to the argument on appeal that the amortization statute is void and unenforceable as being a usurpation of the express powers conveyed to the County Council by the Maryland General Assembly, the statute of limitations does not, and can not, bar Appellants' right to challenge the validity of that ordinance. In City of Raleigh, while the Fourth Circuit ruled that National was barred by the statute of limitations from pursuing its takings claim, it likewise expressly recognized that the statute of limitations did not apply to National's facial challenge of the ordinance on First Amendment grounds. The Fourth Circuit stated as follows:

> "Because it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period, and since National's First Amendment claims raise purely legal issues which are well-settled, we review National's First Amendment claims on the merits." Id., at 1168. (Emphasis added.)

It is equally doubtful that in the case at bar a statute of limitations can insulate the Montgomery County ordinance from being facially challenged on the grounds that it is void and unenforceable as being a usurpation of the County Council's enabling authority. The Fourth Circuit's ruling in the present case is contrary to, and in conflict with, its expressed opinion stated in City of Raleigh.

The Fourth Circuit's Opinion is further in conflict with numerous cases throughout the nation, including case law from the United States Supreme Court as well as other State Appellate Courts and Federal Circuit Courts, that have held that a statute of limitations, or the similar defenses of laches and estoppel, cannot bar one's right to challenge an ordinance that is void due to an inherent or jurisdictional defect. In Ogden City v. Armstrong, 168 U.S. 224 (1897), the United States Supreme Court was confronted with a situation whereby a taxpayer challenged the authority of the City and its officers to levy an assessment upon real property for the purpose of paving a portion of one of the city streets. The City argued that the challenge was time-barred by the statute of limitations which, in that case, was sixty days from the date the taxpayer paid an assessment under formal protest. The Supreme Court held as follows:

> As respects this contention, we agree with the supreme court of the territory that this statute applies to cases where there are only errors, irregularities, overvaluations, or other defects

> which are not jurisdictional, but that where the council, not having jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application. Id., at 241.

Plainly, this Court recognized the distinction between challenging a statutory implementation on the basis of a procedural defect as opposed to doing so on the grounds that the implementing body lacked the authority, and thus the jurisdiction, to do so in the first place.

Other Courts have recognized the fundamental principal that jurisdictional challenges to the validity of a statute or ordinance cannot be time barred. In Schaeffer v. Anne Arundel County, 338 Md. 75, 656 A.2d 751 (Ct. App. 1995), the Maryland Court of Appeals was called upon to decide whether a constitutional challenge to an ordinance based upon improper enactment procedures could be barred by the doctrine of laches. In ruling that a procedural challenge such as the one asserted in that case could be barred by laches, the Court made the critical distinction between a procedural challenge and a challenge of the enabling power in the first instance:

> The challenge in this case must be distinguished from a claim that the municipality had no power to enact an ordinance or that the ordinance is intrinsically void. Schaeffer contends that the ordinance is void due merely to a procedural defect in its enactment, with no substantive objection to its validity, but adopting such a position would put all ordinances at risk of procedural challenges decades after enactment. At the

> latest, Schaeffer had constructive knowledge of any defect in enactment procedures when the notice of enactment was published on June 9, 1989. We cannot allow plaintiffs to take a "wait and see" approach to ordinances, challenging an ordinance many years after enactment on procedural grounds. Laches remains applicable when a challenge to enactment procedures is involved with no substantive objection. See, e.g., Citizens for Responsible Gov't v. Kitsap County, 52 Wash. App. 236, 239, 758 P.2d 1009, 1011 (1988). 338 Md. at 80.

Just as this Court did in Ogden City, supra, the Maryland appellate court recognized the distinction between a challenge of an ordinance on the basis of a procedural irregularity, which may be time barred, and a challenge of an ordinance based upon a usurpation of power, which can not be time barred.

In Citizens for Responsible Gov't v. Kitsap County, 52 Wash. App. 236, 239, 758 P.2d 1009, 1011 (1988), the case cited in Schaeffer, Id., the Court of Appeals of Washington stated as follows:

> Thus, in zoning matters, an ordinance that is clearly a usurpation of power, inconsistent with constitutional or statutory provisions, or an invasion of property with no relation to the public health, safety, morals, or welfare, is void and incapable of being validated. It can be attacked at any time, regardless of previous acquiescence or the amount of time since its passage. (Emphasis added). Id., 758 P.2d at 1011.

Similarly, in Tocci v. City of Three Forks, 700 P.2d 171, 174 (Mont. 1985), the Supreme Court of Montana held that "...[a] property owner ordinarily cannot waive or become estopped from challenging the validity of an assessment which is void by reason of an inherent defect such as lack of statutory power to assess." In Hudson County Park Commission v. Jacobson, 132 NJL 287, 40 A.2d 201, 202 (1944), the Supreme Court of New Jersey, when confronted with a challenge to the facial validity of a tax assessment, stated,"[T]he lapse of time could not give life or validity to the ultra vires act of the municipality in attempting to levy an illegal assessment." See also, Home Depot, USA, Inc. v. Baum, 226 A.D.2d 725, 641 N.Y.S.2d 707 (N.Y. 1996)(The statute of limitations would not bar a challenge of a board's jurisdiction when the ordinance enacted was ultra vires.); ANZA Parking Corp. v. City of Burlingame, 195 Cal. App.3d 855 (Cal. 1987)(Statute of limitations does not apply to bar a challenge to the zoning authority of a city to act in a certain manner); Forest Hill Cemetery v. City of Ann Arbor, 303 Mich. 56, 5 N.W.2d 565 (Mich. 1942) (Laches could not bar a suit to permanently enjoin the collection of unpaid installments of special assessments when the assessment was facially invalid); Randall v. Arkansas City, 114 Kan 178, 217 P 298 (Kan. 1923) (Statute of limitations does not apply to an assessment levied by a city that is entirely illegal); Holden v. Boerne, 252 SW2d 474 (Tex. 1952)(The right to attack an assessment that is wholly void is not cut off by the expiration of the statutory limitation period).

In Public Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147 (D.C. Cir. 1990), the United States Circuit Court for the District of Columbia recited the Circuit's long-standing rule that although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative of statute may be raised outside a statutory limitations period.

The challenge of the amortization ordinance at issue constitutes a challenge of the very jurisdiction of the County Council. It is well settled law in Maryland that the question of jurisdiction can be raised at any time. Stewart v. State, 287 Md. 524, 527-28, 413 A.2d 1337 (1980); Pedzich v. State, 33 Md. App. 620, 365 A.2d 567 (1976); Tate v. State, 236 Md. 312, 203 A.2d 882 (1968); Bowen v. State, 206 Md. 368, 111 A.2d 844 (1955); Berlinsky v. Eisenberg, 190 Md. 636, 59 A.2d 327 (1948); Carroll v. State, 19 Md. App. 179, 310 A.2d 161 (1973); Waldrop v. State, 12 Md. App. 371, 278 A.2d 619, cert. denied, 263 Md. 722 (1971).

Dating back to 1968, and as recently as 1997, the County Council continuously implemented various different versions of its amortization ordinance, and Montgomery County's attempted enforcement of the 1992 ordinance in 1997 constitutes yet another unlawful exercise of a power that the Council simply does not possess. In City of Raleigh, this Court stated, "[I]n general, 'to establish a continuing violation . . . the plaintiff must establish that the unconstitutional or illegal act was a . . . fixed and continuing practice.' (Citation omitted)." A continuing violation was defined in Raleigh as something that is "occasioned by continual unlawful acts, not continual ill effects from an original violation." The mere enactment of a void ordinance does not in and of itself impose any harm on Appellants; it was not until Montgomery County sought to enforce that ordinance that Appellants suffered potential damages. Indeed, the relief sought in this case by Appellants was for an injunction against the County's enforcement of the ordinance. Logic dictates that it would be impossible to challenge the enforcement of an ordinance prior to its attempted enforcement. The decision entered herein, however, would breathe life into and give validity to an ordinance that is otherwise void and unenforceable. Such a result is clearly against public policy, and is detrimental to Appellants.

The judiciary acts as a check on the abuse of the executive and legislative powers. It is the inescapable responsibility of the judiciary, state and federal, to determine whether or not legislation transgresses the limits on legislation. McRae v. Califano, 491 F. Supp. 630 (D.C.N.Y. 1980). The greatest deterrent to the enactment of unlawful statutes by the Legislature is the power of the courts to invalidate statutes. Illinois v. Krull, 107 S.Ct. 1160, 480 U.S. 340, 94 L.Ed.2d 364, on remand People v. Krull, 128 Ill.Dec. 105, 534 N.E. 2d 125, 126 Ill.2d 235 (1987). By ordering, *sua sponte*, that Petitioners' claims are barred by the Statute of Limitations, the Fourth Circuit breached its obligation to act as a check to the abuse of legislative authority.

In 1997 the County Council enacted a new amortization ordinance, wherein it once again committed an ultra vires act. On July 7, 1997, Appellants filed an Amended Complaint to challenge the enforcement of the newly enacted amortization provision. Accordingly, even if a statute of limitations applied to Appellants' challenge of the County Council's enabling authority as of the date of the enactment of the ultra vires ordinance, which it does not, Appellants' challenge of the 1997 ordinance was well within the statute of limitations period. It is well-settled law that under the "reopener doctrine", the period for seeking judicial review may be made to run anew when the agency in question by some promulgation creates an opportunity for renewed comment and objection. Natural Resources Defense Council, Inc. v. U.S., E.P.A.,25 F.3d 12063, 306 U.S. App. D.C. 357 (D.C. Cir. 1994).

II. THE STATUTE OF LIMITATIONS ON PETITIONERS' CLAIM TO BE PAID FAIR MARKET VALUE PURSUANT TO ARTICLE 25, SECTION 122E, ANNOTATED CODE OF MARYLAND, DID NOT BEGIN TO RUN UNTIL PLAINTIFF WAS ORDERED BY RESPONDENTS TO REMOVE THEIR BILLBOARDS.

In addition to the facial challenge of the ordinance, Appellants argued on appeal that the lower Court erred in failing to determine that the County was required, at a minimum, to pay fair market value to Appellants as statutorily required pursuant Article 25, Section 122E, Annotated Code of Maryland. This obligation arises if and when the County orders the physical removal of the billboards. As a result, the statute of limitations on this claim would not have begun to run until the date the County notified Appellants to remove the subject billboards, and failed and/or refused to offer to pay fair market value. As such, the Fourth Circuit's Opinion is in error as to that issue as well.

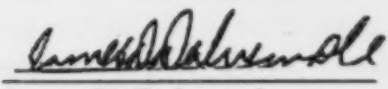
Appellants further argue on appeal that the County Council likewise lacks the authority to enact an amortization provision by virtue of the mandates set forth in Article 25, Section 122E (together with its legislative history) which specifically requires payment of fair market value by a municipality upon the forced removal of a billboard. As argued in Appellants' briefs submitted below, the legislative history surrounding Article 25, Section 122E makes it clear that this statute was in replacement of the amortization approach to billboard removal. (See App. 30) Notwithstanding this, in 1992 and again in 1997, the County Council enacted a new sign ordinance in which it seeks to force the removal of billboards utilizing an amortization approach. This constitutes an unlawful exercise of

jurisdiction and for the reasons set forth above, Appellants' challenge of this ultra vires act can not be time barred.

CONCLUSION

The Fourth Circuit's decision is in conflict with both Federal and State cases that recognize the fundamental principal that jurisdictional challenges to the validity of a statute or ordinance cannot be time barred. In so doing, the Fourth Circuit erred as a matter of law when it dismissed Petitioners' claims on the basis of the Statute of Limitations, and it further evaded its responsibility to determine whether the implementation of the challenged ordinance was an abuse of power and an ultra vires act. In addition, the Fourth Circuit erred as a matter of law by holding that Petitioners' claims for payment of fair market value pursuant to Section 122E were likewise time barred by the Statute of Limitations. Accordingly, this Court should grant Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WHITEHEAD ASSOCIATES, INCORPORATED; CHESAPEAKE OUTDOOR ENTERPRISES, INCORPORATED; PNE MEDIA, INCORPORATED,

Plaintiffs-Appellants,

98-2716

v.

MONTGOMERY COUNTY COUNCIL; MONTGOMERY COUNTY, MARYLAND; MONTGOMERY COUNTY EXECUTIVE,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Alexander Williams, Jr., District Judge.
(CA-97-2171-AW)

Argued: November 30, 1999
Decided: January 13, 2000
Entered: January 13, 2000

Before MURNAGHAN, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: James David Dalrymple, JAMES D. DALRYMPLE, ESQ., P.C., Gaithersburg, Maryland, for Appellants. Clifford Lee Royalty, Assistant County Attorney, Rockville, Maryland, for Appellees. **ON BRIEF:**

Charles W. Thompson, Jr., County Attorney, Karen Federman Henry, Associate County Attorney, Rockville, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

We consider here a challenge by three billboard owners to a county billboard ordinance. The district court granted summary judgment to the County. We affirm, albeit on different grounds than those relied on by the district court.

I.

Whitehead Associates, Incorporated, Chesapeake Outdoor Enterprises, Incorporated, and PNE Media, Incorporated engage in the outdoor advertising business. They own three billboards in Montgomery County, Maryland, which they erected in 1965 and have continuously used since that time.

In 1986, the Montgomery County Council revised its zoning ordinance to prohibit all billboards advertising products or businesses "not connected with the site or building on which they are located." Montgomery County, Md., Code § 59-F-1.65 (1986). In 1992 the County Council further amended the zoning ordinance to provide a five-year amortization period. Thus, after the 1992 revisions, the ordinance provided in relevant part:

> Commercial signs or structures that advertise products or businesses not connected with the site or building on which they are located are prohibited. The only exceptions to this

> prohibition are: . . . (b) Commercial signs or structures that are prohibited by this section and that were lawful on July 28, 1986 . . . . These signs or structures may be continued for a period of five years from July 13, 1992. At the end of this five-year amortization period, the signs or structures must be removed within 90 days at the owner's expense.

Montgomery County, Md., Code § 59-F-1.65 (1992).

Pursuant to this ordinance, the County ordered Whitehead to remove its billboards in 1997. Whitehead responded by filing suit in the Circuit Court for Montgomery County against Montgomery County, the County Council, and the County Executive, alleging that the ordinance exceeded the County's zoning authority under state law and conflicted with a state requirement that a county pay fair market value for any lawfully erected billboards that it subsequently orders removed. The complaint also asserted other claims, including an allegation that the ordinance worked an unconstitutional taking, which are not pursued on appeal.

After Montgomery County removed the case to federal court, the court granted motions to join Chesapeake and PNE as additional plaintiffs. The parties filed cross motions for summary judgment. In addition to opposing the billboard owners' arguments as to the ordinance, the County maintained that limitations barred the owners' claims. Without reaching the limitations question, the district court granted the County summary judgment, rejecting the owners' challenges to the ordinance. The billboard owners appeal.

II.

We need not address the owners' challenges to the ordinance because the applicable statute of limitations bars them from raising these contentions.

Section 5-101 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code provides the applicable statute of limitations. It states that a civil action must be brought"within three years from the date [the cause of action] accrues." Md. Code Ann., Cts & Jud. Proc., § 5-101 (1998). The billboard owners maintain that their cause of action did not accrue until 1997, when the ordinance's amortization period expired and the County sought to enforce the ordinance by ordering them to remove their billboards. See Reply Brief at 2 ("It is the Appellees' attempt to enforce the 1992 ordinance that gave rise to Appellants' need to institute this suit, and the statute of limitations did not begin to run until May 29, 1997 [when the County ordered Whitehead to remove its billboards].").

We considered a similar contention in National Advertising Co. v. City of Raleigh, 947 F.2d 1158, 1161 (4th Cir. 1991). There a billboard owner also challenged an amortization provision in a local billboard ordinance. The owner in that case maintained that its cause of action did not accrue until the expiration of the amortization period. We rejected the argument, concluding instead that the billboard owner's claim accrued on the date that the local government passed the challenged billboard ordinance. We reasoned that the "cause of action arose when the ordinance was enacted because it was then, if at all, that [the billboard owner] suffered the regulatory interference with the primary uses of its property." Id. at 1163.

Although City of Raleigh involved a 42 U.S.C. § 1983 claim, the logic of that case controls here because federal law as to when a cause of action accrues is identical to Maryland law. Both follow the "discovery" rule. Compare Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) ("Federal

law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action"), with Hecht v. Resolution Trust Corp ., 635 A.2d 394, 399 (Md. 1994) (Maryland law holds that "a cause of action accrues when a plaintiff in fact knows or reasonably should know of the wrong").

Applying the City of Raleigh rationale here, the owners' cause of action clearly accrued in 1992 when the County Council enacted the challenged amortization provision. On that date"the useful lives of [the owners'] nonconforming signs were shortened" to five years. See City of Raleigh, 947 F.2d at 1163. Thus if the owners "suffered regulatory interference" with their property interests, id., it was in 1992 when the amortization provision was enacted, not in 1997 when the amortization period expired.

In their second amended complaint, the owners allege that they "erected the subject billboards in 1965 and have continuously used the billboards since." Thus, it is undisputed that they owned the billboards when the County Council enacted the amortization provision in 1992. However, the owners did not file this lawsuit until 1997, five years after their cause of action accrued. Hence, Section 5-101's three-year limitations period bars the owners' suit.

III.

Because the applicable statute of limitations bars the owners' cause of action, we affirm the district court's order granting summary judgment to the County.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WHITEHEAD ASSOCIATES, INC., et al.,
Plaintiff,

v.

MONTGOMERY COUNTY COUNCIL, et al.,
Defendants.

Civil Action No. AW 97-2171

Entered: October 14, 1998

MEMORANDUM OPINION

I

Presently before the Court are Plaintiffs' motion for summary judgment and Defendant's cross-motion for summary judgment. In ruling on the motion, the Court has considered the briefs of the parties, the arguments of counsel at a hearing in open court, and the entire record. For the reasons that will follow, the Court will deny Plaintiffs' motion and grant Defendant's cross-motion.

II

Plaintiff, Whitehead Associates ("Whitehead"), is in the outdoor advertising business. Whitehead owns two billboards in Silver Spring, Maryland. The billboards were erected in 1965 pursuant to a lawfully issued permit and have been in continuous use ever since. Plaintiff, Chesapeake Outdoor Enterprises ("Chesapeake"), has been the owners of a billboard located at 11272 Georgia Avenue

since 1993 or 1994. Chespeake purchased the billboard from Whitehead.

In 1970, Whitehead, was informed that Montgomery County ("County" had enacted an ordinance requiring it to take down its billboards, when the County refused to reissue its permit. Plaintiff challenged the ordinance, bringing a claim to the local "Sign Review Board" and then to the "Board of Appeals" which both ruled in the County's favor. Whitehead then pressed its claim to Circuit Court for Montgomery County, Maryland where the matter was ultimately dismissed as moot when the local zoning ordinance was repealed.

On May 29, 1997, the Department of Permitting Services of Montgomery County, Maryland, delivered Whitehead a letter ordering the removal of its billboards within ten days. According to the letter, the billboards were in violation of § 59-F-1.65 of the Montgomery County Zoning Ordinance, that was enacted in 1992. On November 19, 1997, a similar letter was mailed to Chesapeake.

The 1992 ordinance read at:

> Commercial signs or structures that advertise products or businesses not connected with the site or building on which they are located are prohibited. The only exception to this prohibition are: . . . Commercial signs or structures that are prohibited by this section that were lawful on July 28, 1986 or were lawfully constructed, structurally altered or relocated after July 28, 1986. These signs or structures may be continued for a period of five (5) years from July 13, 1992. At the end of this 5-year amortization period, the signs or structures must be removed within ninety (90) days at the owner's expense.

On November 18, 1997, the County Council for Montgomery County, Maryland adopted a new Chapter 59 of the Montgomery County Code, which became effective December 8, 1997. The challenged provision is currently found in § 59-F-7.1(I). It states:

> Except for signs permitted by this ordinance, a sign must not be used to identify a site other than the site where the sign is erected. Signs or structures that were lawful on July 28, 1986 or were lawfully constructed, structurally altered, or relocated after July 28, 1986 may be continued for a period of 5 years from July 13, 1992. At the end of this amortization period, the signs or structures must be removed within 90 days at the owner's expense.

Plaintiffs brought an action in state court claiming that § 59-F-1.65 is unenforceable and invalid because it is in conflict with state law. The defendants removed, and plaintiffs have filed an amended complaint, alleging that the statute also amounts to a taking under the Fifth and Fourteenth Amendments of the Constitution and deprived them of their civil rights under 42 U.S.C. § 1983. Before removal, a state court judge entered a temporary restraining order enjoining the County from removing the billboards. The TRO expired on March 16, 1998.

By an Opinion and Order dated February 9, 1998, this Court denied Plaintiffs' motion for Summary Judgment and granted Defendants' Cross-Motion for Summary Judgment on count one of the Amended Complaint, holding that there was no statutory obstacle to Defendants' requirement that Plaintiffs remove their billboards. Plaintiffs remaining claims, which the Court bifurcated pursuant to Plaintiffs' request, include violations of civil rights, taking without just compensation, violations of the First

Amendment, and tortious interference with contract. These claims stem from the same directive from the Defendants that Plaintiffs remove their billboards. The parties have filed cross-motions for summary judgment on these claims. On September 28, 1998, a hearing was held in open court on these motions.

III

Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The evidence of the non-movant is to be believed and all justifiable inferences drawn in her favor, but a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 164 (4th Cir. 1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted). Applying these principals to the record, the Court concludes that summary judgment must be granted for the Defendants.

IV.

At the September 28, 1998 hearing, the Plaintiff argued that the 1997 version of the ordinance was unenforceable on two grounds.[1] Plaintiff claimed that the

[1]Plaintiffs have not addressed the issues of the alleged civil rights violations, First Amendment violations, or tortious interference in their motion, response to Defendants' motion, or in their reply.

1997 ordinance was an ex post facto law. Secondly, Plaintiffs argued that the 1997 ordinance constitutes a taking without just compensation or fair marker value being given by the County to the owners of the billboards. The Court will consider these arguments in turn.

Plaintiffs argue that because the County Council for Montgomery County adopted a new Chapter 59 of the Montgomery County Code in 1997, the 1992 ordinance, under which the County gave them notice to remove their billboards, has now been nullified. Thus, Plaintiffs claim, the 1992 ordinance can no longer be applied. Moreover, Plaintiffs claim that the application of the 1997 ordinance to their billboards would "punish" them retroactively, and therefore be in violation of the ex post facto doctrine. The Court finds this position to be untenable.

It is well established that the ex post facto doctrine applies to criminal or penal statutes. In Collins v. Youngblood, the United States Supreme Court stated, "Although the Latin phrase "ex post facto" literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." 497 U.S. 37, 41, 110 S.Ct. 2715, 2718 (1990). This zoning ordinance is not such a statute. The ordinance does not impose a criminal penalty for violations of it. Therefore, the doctrine of ex post facto is inapplicable.

Defendant, however, has argued that these claims are subject to summary judgment, and the Court agrees. The United States Supreme Court has held that local governments can distinguish between onsite and offsite advertising on the same property in banning billboards. See Metromedia, Inc. v. City of San Diego, et al., 454 U.S. 490, 101 S. Ct. 2882 (1981). Moreover, the billboards in question violate the County's ordinance because of their size, and not only because their content. Further, Plaintiffs' civil rights claim and tortious interference claim must fail because, as will be discussed in this opinion, the County has the legal right to remove the signs.

The thrust of Plaintiffs' ex post facto argument is that the 1997 ordinance's amortization period is to be applied retroactively against them. The position is also unfounded. Plaintiffs' contention that the 1992 ordinance has been nullified, and therefore is inapplicable, ignores the fact that the County has a general savings clause that ensures that the repeal of an ordinance does not extinguish the rights and liabilities established under that ordinance. This clause is found in Article II, Section 1-201, of the Montgomery County Code, and provides:

> (a) *Changes.* Unless the law expressly provides otherwise, when the county changes a law, the law does not affect:
>
> (1) Any rights vested in a person before the change became effective;
>
> (2) Any contract rights that existed before the change became effective; and
>
> (3) Any legal actions for a violation of the law that occurred before the change became effective.
>
> (b) *Modifications.* For the purposes of acts that occurred before a new law became effective, if the law modifies an existing provision in the Code, then the modified provision continues the existing provision unless:
>
> (1) The new law states that is does not continued the existing provision; or

(2) The context indicates that the new law was not intended to continue the existing provision.

The new ordinance passed in 1997 did not expressly provide that it was to have an effect on pending legal actions. Further, the County states that the new provisions were to "repeal and replace" the old, not merely repeal them. Therefore, the new law did not state that it was not meant to continued the existing provisions. Finally, the modifications to the law were largely cosmetic. Although the language was altered somewhat, and the provisions were renumbered, there were no substantive changes made. Thus, the context of the new provisions were renumbered, there were no substantive changes made. Thus, the context of the new provisions does not indicate that the new law was not intended to continue the existing provision. Therefore, the 1997 ordinance does not affect the legal steps that the County took to remedy the violation of the 1992 provisions. As those provisions are still applicable against Plaintiffs, the 1997 provisions are not being applied retroactively.[2]

Plaintiffs next argue that the amortization provisions of both the 1992 ordinance and the 1997 ordinance are unenforceable because they do not provide for just compensation to billboard owners. Plaintiff relies on Montgomery County v. Revere National Corp., 341 Md. 366, 671 A.2d 1 (Md. 1996). In that case, the Court of Appeals of Maryland held that the 1986 version of the provisions at issue did not preclude the enforcement of a settlement agreement between the County and another billboard

[2]Plaintiffs have also argued that the notices given to them under the 1992 ordinance are now moot because the 1997 ordinance was passed. As the 1992 ordinance is applicable to them because of the savings clause, this argument is untenable as well.

company, which allowed the company to maintain its existing billboards for ten years. The court said:

> Montgomery County's argument entirely overlooks Code . . . Art. 25 § 122E(b), enacted by the Maryland General Assembly in 1983. This statue unequivocally mandates that "[a] county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality . . . ." Neither the district council's 1986 regulations prohibiting all billboards, nor any other enactment by Montgomery County which have been called to our attention, provide for compensation to the owner of pre-existing lawfully erected billboard."

Id. at 13.

Relying on this language, Plaintiffs argue that Defendants have not offered any compensation, and thus the provision should be enforceable. Revere, however, was based on the 1986 version of the regulations. Id. The 1986 ordinance did not include the five year amortization provision found in the 1992 and 1997 ordinances. Thus, Revere is clearly distinguishable from the instant case.

It is well established that an amortization period which allows for a reasonable time period for the phasing out of a nonconforming use can constitute just compensation under the Fifth Amendment. See National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986). It is also well established that a five year amortization period is reasonable. See Chespeake Outdoor Enterprises, Inc., et al. v. Mayor and City Council of Baltimore, 89 Md. App. 54, 597 A.2d 503, 513 (Md.

1991) ("The Court of Appeals has twice confirmed the constitutional reasonableness of a five-year amortization period for such signs . . . . The Fourth Circuit cases previously referred to involve four and five and a half amortization periods for such signs.")

Although "[n]o Maryland court has [expressly] decided whether an amortization period constitutes 'fair market value' under Article 25, §122 E or just compensation under Article III, § 40 of the Maryland Constitution, the state analogue to the Fifth Amendment," (Defendant's Response at 9), dicta from Chesapeake indicate that it would. In Chesapeake, the Court of Special Appeals of Maryland granted a summary judgment motion for the local government on the grounds that the billboards were not legally maintained, and therefore the owners were not entitled to compensation under Md. Code Ann. Art. 25 §122E. The court stated, however, that:

> We also wish to make clear that summary judgment would still have been proper in this case even if Boisclair had effectively countered the City's assertion that there was no genuine issue as to whether the signs in the city's amortization areas were nonconforming. . . . Here . . . due to the passage of time between the end of the amortization period and the City's enforcement of its zoning ordinance, sign owners in Baltimore City had an opportunity to amortize their signs over a period of no less than 19 years (and perhaps as long as 41 years). Chesapeake, 597 A 2d. at 513.

Further, although no Maryland court has expressly stated that an amortization period constitutes "fair market value," the Court of Appeals has held them to be valid for many years before Art.25 §122E was passed in 1983. See

Grant v. City of Baltimore, 129 A.2d 363 (1957); Donnelly Advertising Corp. of Maryland v. Mayor and City Council of Baltimore, 370 A.2d 1127 (1977); Gough v. Board of Zoning Appeals for Calvert County, 321 A.2d 315 (1977). Courts in Maryland have held them to be valid since 1983 as well. See Chesapeake, 597 A 2d.503; Lone v. Montgomery County, 584 A.2d 142 (Md. Ct. Spec. App. 1991) (holding a ten year amortization period was not taking without compensation). Moreover, the settlement that the parties sought to enforce as compensation in Revere included an amortization period, albeit ten years, instead of a monetary payment.

The Court finds that "fair market value" is a measure used to determine what constitutes "just compensation." As a reasonable amortization period constitutes just compensation in Maryland, it also constitutes fair market value.[3] The five year period is reasonable. Moreover, in this case, Plaintiffs have known that the County has considered their billboards to be illegal since 1970. Therefore, Plaintiffs have had a reasonable time period in which to phase out their use, 28 years.[4]

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[3]Defendants also argue that "fair market value" only needs to be paid to those who have a lawfully maintained billboard. Defendants claim that Plaintiffs; billboards have been in violation of the law since 1970 and therefore they are not entitled to compensation. Since the Court finds that the amortization period constitutes fair market value, the Court does not have to decide on the merits of that argument. Moreover, the Court finds that Plaintiff's claim that Art. 25 §122E is unconstitutional because it determines the amount of just compensation, which Plaintiff argues is a question of fact for a jury, and not for the General Assembly, to decide, and because it denies property owners the chance to recover the full monetary equivalent of the property taken from the, is without merit.

[4]The Court also believes that Defendants may be correct in arguing that Plaintiffs' suit is barred by the statute of limitations, which they claim began to run either when the County first prohibited the billboards in 1968, or alternatively when the 1986 ordinance was passed. Defendants noted that "[a]t that time, Whitehead Associates, in its own capacity and as the predecessor in interest to Chesapeake Outdoor

The County's enforcement of the 1992 ordinance against Plaintiffs does not constitute a taking without just compensation or without the giving of "fair market value." The County has the legal right to enforce this ordinance, and the Court will enter a summary judgment in favor of the Defendants. Defendants have asked the Court to order the Plaintiffs to remove their billboards. The Court will provide this relief, however the Court requests that the parties submit, either separately or jointly, a proposed order for the injunctive relief sought.

A separate order consistent with this opinion will follow.

10-14-98

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

Enterprises, was on notice of its claim." Defendants' Opposition at 12. Plaintiffs claim that the statute of limitations did not begin to run until they received "the now moot notice from Montgomery County." Plaintiffs' Reply at 5. Plaintiffs' federal claims began to accrue "when the affected party knew or should have known of the injury which is the basis of the action." Duke Street Limited Partnership v. Board of County Commissioners of Calvert County, Maryland, 684 A.2d 40, 49 (Md. 1996) (citing National Advertising Co. v. Raleigh, 947 F.2d 1157 (4th Cir. 1991)). "The general Maryland law on accrual of a cause of action is stated in Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981); it accrues at the point in time when a claimant knew or should have known of circumstances that would cause a reasonable person to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the actionable wrong." Id. Plaintiffs have had notice of the possible illegality of their signs since 1970. Furthermore, even though the 1986 ordinance was found to be unenforceable in Revere, the amortization provision which cured the defect in the 1986 ordinance was first enacted in 1992. Therefore, Plaintiffs should have known as of 1992 that they could be injured by the County's actions. The present action was not brought until 1997. As the Court finds that the County can legally require Plaintiffs to remove their billboard, the Court does not have to render a decision on Defendants' statute of limitations argument. However, the Court does find it to be convincing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WHITEHEAD ASSOCIATES, INC.
Plaintiff,

v.

MONTGOMERY COUNTY COUNCIL, et al.,
Defendants.

Civil Action No. AW 97-2171

Entered: October 14, 1998

ORDER

In accordance with the Memorandum Opinion, IT IS this 14th day of October, 1998, by the United States District Court for the District of Maryland, Southern Division, hereby

ORDERED:

1. That Plaintiff's Motion for Summary Judgment BE, and the same hereby IS, **DENIED**;

2. That Defendant's Cross-Motion for Summary Judgment Be, and the same hereby IS, **GRANTED**;

3. That the parties submit, either separately or jointly, a proposed order for injunctive relief.

4. That the Clerk of the Court **CLOSE** this case; and

5. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WHITEHEAD ASSOCIATES, INC.
Plaintiff,

v.

MONTGOMERY COUNTY COUNCIL, et al.,
Defendants.

Civil Action No. AW 96-2171

Entered: February 5, 1998

I

Presently before the Court are Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment. In ruling on the motion, the Court has considered the briefs of the parties, the arguments of counsel at a hearing in open court, and the entire record. For the reasons that will follow, the Court will deny Plaintiff's motion and grant Defendant's cross-motion.

II

The Plaintiff, Whitehead Associates, is in the outdoor advertising business. Plaintiff owns two billboards in Silver Spring, Maryland. The billboards were erected in 1965 pursuant to a lawfully issued permit and have been in continuous use ever since.

In 1970, Plaintiff was informed that Montgomery County had enacted an ordinance requiring him to take down its billboards. Plaintiff challenged the ordinance, bringing a claim to the local "Sign Review Board" and then to the

"Board of Appeals" who both rules in the County's favor. Plaintiff then pressed his claim to U.S. District Court, where the matter was ultimately dismissed as moot when the local zoning ordinance was repealed.

On May 29, 1997, the Department of Permitting Services of Montgomery County, Maryland, delivered Plaintiff a letter ordering the removal of its billboards within ten days. According to the letter, the billboards were in violation of § 59-F-1.65 of the Montgomery County Zoning Ordinance, enacted in 1992.

The ordinance reads: "Commercial signs or structures that advertise products or businesses not connected with the site or building on which they are located are prohibited. The only exception to this prohibition are: . . . Commercial signs or structures that are prohibited by this section that were lawful on July 28, 1986 or were lawfully constructed, structurally altered or relocated after July 28, 1986. These signs or structures may be continued for a period of five (5) years from July 13, 1992. At the end of this 5-year amortization period, the signs or structures must be removed within ninety (90) days at the owner's expense."

Plaintiff brought an action in state court claiming that § 59-F-1.65 is unenforceable and invalid because it is in conflict with state law. The defendants removed, and Plaintiff has filed an amended complaint, alleging that the statute also amounts to a taking under the 5th and 14th amendments of the Constitution and deprived him of his civil rights under 42 U.S.C. § 1983. Before removal, a state court judge entered a temporary restraining order enjoining the County from removing the billboards. The TRO expires on March 16, 1998. This Court has bifurcated the proceedings, and the only question presently before the Court is whether the statute is enforceable under state law. The parties have filed cross-motions for summary judgment.

III

A.

Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The evidence of the non-movant is to be believed and all justifiable inferences drawn in her favor, but a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 164 (4th Cir. 1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1986)). "Summary judgment procedure is properly regarded not a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted). Applying these principles to the record, the Court concludes that summary judgment must be granted for the Defendants.

B.

The Regional District Act, promulgated by the Maryland General Assembly, is the exclusive source of Montgomery County's zoning authority. Mossburg v. Montgomery County, 329 Md. 494, 499 (1993). The Act provides that a district council may adopt zoning ordinances regulating, among other things, "the location and uses of building and structures and units therein for trade, industry, residence, recreation, agriculture, public activities and other purposes." Regional District Act, § 8-101(b)(2).

Plaintiff contends that § 8-109 of the Regional District Act supersedes the local ordinance, permitting a

"lawful non-conforming use"[1] to continue so long as the particular use remains unchanged.

The language of § 8-109(b), at first glance, appears to support Plaintiff's argument.[2] The provision states that

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[1] A "lawful non-conforming use" is a use that was lawful before the enactment of the applicable zoning provision. Lone v. Montgomery County, 85 Md. App. 477, 496 (1991).

[2] Section §8-109 provides:

§ 8-109 Commercial licenses in residential zones: nonconforming uses generally.

(a) Licenses not to be issues. - - No clerk of the Circuit Court of Montgomery County or of Prince George's County, no administrative official, no licensing body or board, and no person whatever may issue a license or permit for any commercial or industrial purpose or for the conducting of any commercial or industrial enterprise or business whatsoever in a residential zone, that is, in any district designated on the zone maps as residential within the regional district, unless the purpose, enterprise, or business is allowed by the applicable zoning ordinance under permitted uses or special exceptions granted by the board of appeals.

(b) Lawful nonconforming uses continued. - - However, in the cases of a lawful nonconforming use existing at the time of the enactment of the respective zoning ordinances within that portion of the regional district in Montgomery and Prince George's Counties comprising the Maryland-Washington Metropolitan District, created by Chapter 448 of the Acts of the General Assembly of Maryland of 1927, as amended, the particular use may be continued and appropriate licenses may be issued, limited, however, to the particular use already existing in each case.

(c) Alcoholic beverage licenses. - - In addition, the board of license commissioners of Montgomery County, within its discretion, may issue and renew alcoholic beverage licenses as have been heretofore issued by the board for premises on which lawful nonconforming uses exist. No license may be issued which is less restrictive than any which has been issued for the premises heretofore.

(d) Nonconforming uses outside of metropolitan district. - - In addition, in the case of a lawful nonconforming use existing at the time of the enactment of zoning ordinances under the provisions of this title in that portion of the regional district in Montgomery and Prince George's Counties, respectively, outside the metropolitan district, the particular use which existed at the effective date of the zoning ordinances, adopted under the authority of this title, may be continued,

"lawful nonconforming use[s] . . . may be continued." Because "the Regional District Act is . . . the exclusive source of zoning authority in Montgomery County, . . . any enactment concerning zoning in the county, which is at variance with the Regional District Act, is inoperative within the district." Council of Chevy Chase View v. Rothman, 323 Md. 674, 685 (1991). While Plaintiff cites no Maryland authority involving the zoning of billboards, it does cite numerous out-of-state cases which hold that where the state has explicitly granted a municipality the power to enact zoning laws, but creates an exception for pre-existing structures, the municipality cannot enact zoning regulations prohibiting billboards in disregard of those exceptions. E.g., Cioffoletti v. Planning and Zoning Commission of Ridgefield, 584 A.2d 1200 (Conn.1991); United Advertising v. Borough of Raritan, 93 A.2d 362 (N.J., 1952).

From this, Plaintiff concludes that Montgomery County may not eliminate lawful nonconforming uses because the state Legislature has mandated that such uses be permitted. However, an examination of the complete text of the statute calls into serious question whether the Maryland state legislature has, in fact, enacted a law of general application relating to the permissible existence of nonconforming uses. In fact, canons of statutory construction lead this Court to conclude that §8-109(b) is nothing more than a limitation to the prohibition of

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and appropriate licenses may be issued, limited, however, to the particular use in each case.

(e) Maps to be finished. - - For the purpose of carrying our the provisions of this section, the Commission shall supply every clerk, administrative official, licensing body or board, and every other official or body empowered to issue any license or permit, with a copy of the map or maps showing the residential, commercial, industrial, and other zones or districts in the regional district.

(f) Invalid licenses or permits. - Every license or permit issued in violation of this section is invalid; and the issuance of he license or permit is a misdemeanor and punishable under the general penalty provisions of this article.

commercial licenses in residential zones found in §9-109(a), and inapplicable to the situation at hand.

The Court notes at the outset that neither the parties nor the Court have been able to locate any meaningful legislative history pertinent to the disputed provision. Accordingly, the Court must interpret the statute as best it can consistent with general principles of statutory construction. It is of course a fundamental rule of statutory construction that where the plain language of a statute is clear, courts can go no further in attempting to glean what the legislature meant when it enacted the provision. See, e.g., United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (Where statutory language is plain, "the sole function of the court is to enforce it according to its terms"). Nonetheless, statutory provisions are not to be read in isolation. Because "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, . . . it is not proper to confine interpretation to the one section to be construed. . . . From this assumption proceeds the cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all parts be interpreted as subsidiary and harmonious." 2A J. Sutherland, Statutes and Statutory Construction, § 46.05 (4th ed. 1984).

Applying these principles the instant statute, it cannot be concluded that the legislature intended to craft a general exception to zoning laws for nonconforming uses. Paragraph (a) of §8-109 states the general proposition that no license or permit may be issued for a commercial or industrial purpose in a residential zone. Immediately following is paragraph (b), the passage pertinent to this case, which begins with the word "[h]owever," and explains that nonconforming uses existing at the time of the enactment of a zoning ordinance "may be continued, and appropriate licenses may be issued," so long as the existing use remains unchanged. See §9-109(b). The legislature's use of the term "however," meaning "in spite of," or "on the other hand," (Webster's

New Collegiate Dictionary, 9th ed) suggests that paragraph (b) was intended to qualify the rule of paragraph (a). That is, to the extent that paragraph (a) prohibits certain nonconforming uses from existing, section (b) simply creates an exception to the specific limitation. It does not craft a general rule prohibiting otherwise valid local ordinances form eliminating nonconforming uses.[3] That paragraph (b) merely creates an exception to the general prohibition of nonconforming uses in paragraph (a) is illustrated by the fact that the Legislature simply stated, permissively, that nonconforming uses "may" continued. It does not state that nonconforming uses must be allowed to continue.

The Plaintiff argues that such a reading of paragraph (b) is nonsensical. It maintains that the legislature could not reasonably be expected to require nonconforming uses to be continued. "If §8-109(b) were drafted to state that non-conforming uses shall continue to exist after the enactment of a zoning ordinance [that] renders them non-conforming uses, it would mean that the owner of a property with a non-conforming use must continue that use, and can not discontinue."

However, had the legislature intended for paragraph (b) to mandate the maintenance of non-conforming uses, it could easily have spelled this out using language explaining, for example, that all non-conforming uses shall be permitted to continue. Yet, the legislature simply stated that such uses "may" continue. It may fairly be concluded that the Legislature's direction that non-conforming uses may continue does not mean that they must be allowed to continue. See Sheppard v. Riverview Nursing Center, 88

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[3]Concededly, the title of the provision is "Commercial licenses in residential zones; nonconforming uses generally." (emphasis added.) While this suggests that the provision regarding nonconforming uses was not limited to paragraph (a), the provision's title does not control over what is expressed in the text. See Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528 (1947) (title of a statute or the heading of a section cannot limit the plain meaning of the text).

F.3d 1332, 1338 (4th Cir. 1996) ("[Y]oung children . . . learn early on that 'may' is a wonderfully permissive word. 'Shall,' by contrast, is more sternly mandatory"). And more importantly, had the legislature intended a rule of general application, it would not have used the limiting term "however" in introducing section 8-109(b).

A narrow construction of section 8-109(b) is especially appropriate in light of the Legislature's expression in §1-104 of the same article that "[n]othing contained in this article may be deemed or construed to validate, ratify, legalize, or make conforming, any . . . structure or use which was, is, or may hereafter be unlawful or prohibited under any ordinance . . . enacted . . . by the County Council or district council of Montgomery County." The Legislature has declared that the Regional District Act, as a general matter, was not intended to "impair the effectiveness" of local ordinances or "validate [or] ratify" nonconforming uses. § 1-104. Further, the Maryland courts have long recognized that because "one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses, . . . ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." Council of Prince Georges County v. E.L. Gardner, 293 Md. 259, 267-268 (1982). The Maryland courts have seemingly acknowledged the power of Montgomery County to amortize nonconforming uses. See Lone v. Montgomery County, 85 Md.App. 477 (1991). Inasmuch as this Court must endeavor to resolve any dispute regarding the meaning of § 8-109(b) in a manner consistent with the Legislature's general purpose (see United Savings v. Timbers, 484 U.S. 365, 371 (1988); Sutherland Stat. Const. § 45.07), it must be concluded that § 8-109(b) was not intended to generally "ratify" nonconforming uses by creating a universal exemption from local zoning ordinances for such uses. Section 8-109(b) merely stands for the unremarkable proposition that lawfully existing commercial uses in

residential zones are not made unlawful by § 8-109(a) of the Regional District Act.

In this case the local zoning ordinance does not relate to commercial uses is residential areas - it merely required that lawful nonconforming billboard uses be eliminated over a five year period of amortization. The amortization of lawful nonconforming uses has been repeatedly upheld by the Maryland courts. E.g., Grant v. City of Baltimore, 212 Md. 301 (1957) (five year amortization period for billboards is valid); Shifflett v. Baltimore County, 247 Md. 151 (1967) (ordinance requiring all junkjards be eliminated in two years held constitutional). Section 8-109(b) does not compel a different result. Because the issues in this case have been bifurcated, the Court does not reach the remainder of Plaintiff's claims challenging the amortization of its property. The Court simply holds that the Regional District Act provides no barrier to the enforcement of the zoning ordinance.

IV

In light of the foregoing analysis and conclusion, the Court need not reach the question of whether Plaintiff's claim is barred by principles of res judicata or collateral estoppel.[4] Plaintiff's motion for summary judgment is denied.

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[4] The Court notes that Plaintiff's 1970 claim was rejected on the merits by both a sign review board and a board of zoning appeals before being dismissed as moot by the federal district court. It appears, however, that a determination of a board of zoning appeals does not have preclusive effect because it is not a court of "competent jurisdiction." Knox v. Mayor and City Council of Baltimore, 180 Md. 88, 92 (1941). It also appears that the district court's dismissal for mootness is not a dismissal "on the merits" calling for the application of issue or claim preclusion. Lake Falls Association v. Board of Zoning Appeals of Baltimore, 209 Md. 561, 567 (1955) (res judicata does not preclude relitigation of challenge of zoning law where first claim dismissed for mootness after previous zoning ordinance repealed).

Defendant's cross-motion for summary judgment is granted. A separate order consistent with this opinion will follow.

2-5-98
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WHITEHEAD ASSOCIATES, INC.
Plaintiff,

v.

MONTGOMERY COUNTY COUNCIL, et al.,
Defendants.

Civil Action No. AW 96-2171

Entered: February 5, 1998

ORDER

In accordance with the Memorandum Decision, IT IS this 5th day of February, 1998, by the United States District Court for the District of Maryland, Southern Division, hereby **ORDERED:**

1. That Plaintiff's Motion for Summary Judgment BE, and the same hereby IS, **DENIED**;

2. That Defendant's Cross-Motion for Summary Judgment BE, and the same hereby IS, **GRANTED**; and

3. That the Clerk of the Court shall mail copies of this Order to all parties of record.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2716
CA-97-2171-AW

FILED: February 8, 2000
ENTERED: February 8, 2000

WHITEHEAD ASSOCIATES, INCORPORATED; CHESAPEAKE OUTDOOR ENTERPRISES, INCORPORATED; PNE MEDIA, INCORPORATED

Plaintiffs - Appellants

v.

MONTGOMERY COUNTY COUNCIL; MONTGOMERY COUNTY, MARYLAND; MONTGOMERY COUNTY EXECUTIVE

Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Senate Bill No. 702

AN ACT concerning

Outdoor Advertising - Highway Signs

For the purpose of prohibiting any county or municipality from removing or requiring the removal of certain outdoor advertising signs unless the county or municipality pays a certain fair market value for the sign.

By adding to

Article 25 - County Comissioners
Section 172E
Annotated Code of Maryland
(1981 Replacement Volume and 1981 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND. That section(s) of the Annotated Code of Maryland read(s) as follows:
Article 25 - County Commissioners

122E.

UNLESS THE COUNTY OR MUNICIPALITY PAYS THE FAIR MARKET VALUE OF AN OUTDOOR ADVERTISING SIGN. IN ACCORDANCE WITH THE JUST COMPENSATION SCHEDULE OF THE STATE DEPARTMENT OF TRANSPORTATION, A COUNTY OR MUNICIPALITY MAY NOT REMOVE OR REQUIRE THE REMOVAL OF ANY OFF-PREMISES OUTDOOR ADVERTISING SIGN THAT WAS LAWFULLY ERECTED UNDER STATE, COUNTY, OR MUNICIPAL LAW OR ORDINANCE.

SECTION 2. AND BE IT FATHER ENACTED, That this Act shall take effect July 1, 1982.

June 1, 1982

The Honorable James Clerk, Jr.
President of the Senate
State House
Annapolis, Maryland 21404

Dear Mr. President:

In accordance with Article II, Section 17 of the Maryland Constitution, I have today voted Senate Bill 702.

This bill prohibits any county or municipality from removing outdoor advertising sign unless it pays the "fair market value" of the sign in accordance with a schedule of the State Department of Transportation used in conjunction with its highway beautification program. The effect of the bill would be to eliminate the phasing out of amortization of certain signs by a local jurisdiction without monetary payment as a sign regulation and removal strategy.

The amortization approach has been employed by local government in Maryland for at least 25 years in ? traffic safety and the economic well being ?and esthetic features of the particular jurisdiction within certain constitutional limitations. The Maryland courts have recognized amortization as a valid exercise of the governmental police power which does not amount to an unconstitutional "taking" for which the owner of the sign is entitled to compensation. Grant v. City of Baltimore, 212 Md. 301 (1957); Donnelly Adv. Corp. v. City of Baltimore, 279 Md. 660 (1977).

I believe it is desirable to compensate owners of signs required to be removed by government. However, the regulation of the removal of these signs and their attendant compensation should be undertaken at the same level of government, the local level, responsible for the regulation of the erection of the signs. Because of the complex diversities among the subdivisions and municipalities in Maryland the ability to address issues such as sign location at the local level through zoning powers is a valuable tool that should

not have eroded with State interference in any but extraordinary cases necessary to protect the safety or well being of the public. Senate Bill 702 does not provide any flexibility to accommodate the wide range of circumstances facing local jurisdictions.

That this bill fundamentally changes that which has traditionally been a matter of local concern in Maryland is highlighted by the requests of the Mayor of the City of Baltimore and the County Executives of Montgomery and Baltimore Counties for a veto of Senate Bill 702. In addition, other local elected officials, the Maryland Association of Counties and the Maryland Municipal League have requested a veto.

These public officials and organizations representing local government in Maryland have each noted the bill's constitutional fiscal impact on them. Indeed, the requirement for payment under Senate Bill 702 is absolute. By contrast, under the State highway beautification program compensation is not required to be paid for signs not eligible for federal matching funds and the State is not required to spend any funds for those purposes until appropriate.

April 1, 1983

Honorable Jennie M. Forehand
224B House Official Building
Annapolis, Maryland 21401

Dear Delegate Forehand:

This is in response to your request for advice of counsel concerning Senate Bill 712. Senate Bill 712, which is virtually identical to Senate Bill 702 vetoed by the Governor in 1982, would prohibit any county or municipality from removing or requiring the removal of an "outdoor advertising sign" unless it pays the fair market value of the sign in accordance with a schedule adopted by the State Department of Transportation.

The bill defines an "outdoor advertising sign" as one which is "an off-premises outdoor sign," "commercially maintained" and "used to advertise goods or services for sale in a location other than that on which the sign is placed". §122E(A)(3)(I). The bill further provides that an "outdoor advertising sign includes signs composed of painted bulletin or poster panel, and usually referred to as billboards". (Emphasis added). You have asked whether the bill would be applicable to billboards only. For the following reasons, it is my view that it would not be limited in application to billboards.

The word "includes", as used in the context of the bill, is a term of enlargement rather that limitation. See Black's Law Dictionary 905 (4th ed. 1968). Thus, it can be read as meaning that the terms of Senate Bill 712 are applicable to all outdoor advertising signs as defined including but not limited to billboards. Moreover, other provisions of the Annotated Code concerning outdoor advertising support the conclusion that an "outdoor sign" means something more than merely a billboard as that word is commonly used. See Transportation Article, §8.701(e),

("Any outdoor sign, display, light, structure, figure, painting, drawing, message, plaque, placard, poster, billboard, device, or other thing that is designed, intended, or used to advertise or inform the traveling public."). In contrast, the ordinance at issue in Grebow v. City of Baltimore, 217 Md. 333 (1958), which required the removal of "billboards and poster boards", was held to be limited in application to those types of outdoor advertising signs as commonly and judicially defined, and therefore could not be enforced against an advertising sign which had been painted on the wall of a building. The Court said the term "billboard" means "an erection annexed to the land in the nature of a fence for the purpose of posting advertising, bills and poster" and "poster boards" are "thin walls or screens having a sheet iron surface over a wooden framework in the ground". Id. at 335-36. Both terms contemplate a device with an independent structural support, whereas an "outdoor sign" could encompass an advertisement simply painted on or affixed to, for example, a store, tree, building or other structure.

You have also asked what effect Senate Bill 712 would have on existing depreciation schedules utilized by local jurisdictions in lieu of monetary payment. As you know, Senate Bill 702 enacted at the 1982 session was vetoed by the Governor. One of the reasons for the veto was that the bill would eliminate the "amortization approach". For your convenience and information, I am enclosing a copy of the veto message on Senate Bill 702.

I hope this is responsive to your inquiry.

Very truly yours,

/s/ Linda H. Lamone
Linda H. Lamone
Assistant Attorney General